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No. 04-1371

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

SHADI DABIT, on behalf of himself and
all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF FOR THE SECURITIES INDUSTRY ASSOCIATION AND THE BOND MARKET ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GEORGE R. KRAMER
SECURITIES INDUSTRY ASSOCIATION
1425 K Street, N.W.
Seventh Floor
Washington D.C. 20005
(202) 216-2000

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN*
APRIL E. FEARNLEY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MARJORIE E. GROSS
SARAH M. STARKWEATHER
THE BOND MARKET ASSOCIATION
360 Madison Avenue
New York, New York 10017
(646) 637-9200

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Counsel for Amici Curiae

May 16, 2005

* Counsel of Record

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MOTION OF THE SECURITIES INDUSTRY ASSOCIATION AND THE BOND MARKET ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Securities Industry Association ("SIA") and the Bond Market Association ("TBMA") hereby request, pursuant to Rule 37.2 of the Rules of this Court, leave to file the accompanying brief as *amici curiae* in support of Petitioners. SIA and TBMA obtained the consent of the Petitioners.

SIA and TBMA offer this brief because the issue to be decided affects the interests of the SIA and TBMA and their members. The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and

foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated an estimated $227.5 billion in domestic revenue and $305 billion in global revenues.

TBMA was created in 1976 and represents approximately 200 securities firms and banks that underwrite, trade and sell fixed-income securities in the United States and in international markets. TBMA members include all primary dealers in U.S. government securities and all major dealers in federal agency securities, mortgage-backed and asset-backed securities, corporate bonds, money market instruments, and funding instruments such as repurchase and securities lending agreements. TBMA has worked with Congress, the SEC, the Federal Reserve Board, the Federal Reserve Bank of New York, state regulators and self-regulatory organizations to foster effective, efficient regulation of the markets.

The SIA and/or TBMA have previously filed *amici* briefs with the Court in cases affecting civil liability and the federal securities laws. See, *e.g.*, *Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005); *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991); *Rodriguez De Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987).

The question presented by this case is whether the preemption provision of the Securities Litigation Uniform Standards Act ("SLUSA") applies to state-law class actions by securities holders who claim that they refrained from selling securities in reliance on a misrepresentation. This issue is critically important to the SIA and TBMA because such suits undermine the efforts of Congress to curb

vexatious litigation and enact uniform national standards for securities class actions. The SIA and TBMA therefore have a vital interest in the issue presented in this case and the SIA and TBMA's views can assist the Court in deciding whether certiorari should be granted.

For the foregoing reasons, SIA and TBMA's Motion for Leave to File a Brief as *Amici Curiae* in support of Petitioners should be granted.

Respectfully submitted,

GEORGE R. KRAMER
SECURITIES INDUSTRY
ASSOCIATION
1425 K Street, N.W.
Seventh Floor
Washington D.C. 20005
(202) 216-2000

MARJORIE E. GROSS
SARAH M. STARKWEATHER
THE BOND MARKET
ASSOCIATION
360 Madison Avenue
New York, New York 10017
(646) 637-9200

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN*
APRIL E. FEARNLEY
SIDLEY AUSTIN BROWN &
WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

May 16, 2005

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INTEREST OF THE *AMICI CURIAE*[1]

The Securities Industry Association ("SIA"), established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Bankers' Association, represents the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals. Industry personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. (More information about SIA is available at www.sia.com.)

The Bond Market Association ("TBMA") represents approximately 200 securities firms and banks that underwrite, trade and sell fixed-income securities in the United States and in international markets. TBMA's members transact business in a wide variety of public and private fixed-income securities. Its membership comprises a diverse mix of securities firms and banks, including large, multi-product firms and companies with special market niches. It includes all primary dealers in U.S. government securities, as recognized by the Federal Reserve Bank of New York, and all major dealers in federal agency securities, mortgage-backed and asset-backed securities, corporate bonds, money market instruments, and funding instruments such as repurchase and securities lending agreements. From its inception in 1976, TBMA has worked with its member firms, Congress, the SEC, the Federal Reserve Board and the Federal Reserve

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[1] Pursuant to this Court's Rule 37.6, *amici* SIA and TBMA state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their members made a monetary contribution to the preparation or submission of the brief.

Bank of New York, state regulators, and self-regulatory organizations to foster effective, efficient regulation; to enhance the liquidity and efficiency of the fixed income markets; to encourage sound credit and business practices for participants in such markets; and to promote the highest levels of professional standards and conduct in such markets. (More information about TBMA is available at www.bondmarkets.com.)

The issue raised by this case is whether holders of securities, who "refrained from selling" securities in reliance upon an alleged misrepresentation, Pet. App. 4a-5a, can bring state-law class actions that avoid the preemption provision of the Securities Litigation Uniform Standards Act ("SLUSA"). This issue is one of great import to the securities industry and investors in this era of proliferating securities litigation. It is critically important to the SIA and TBMA that the effort of Congress to curb vexatious litigation in state law securities fraud suits by enacting the uniform national requirements of the Private Securities Litigation Reform Act ("PSLRA"), not fall prey to creative plaintiffs who attempt to plead around SLUSA preemption and the strict federal securities standards. *Amici* therefore have a vital interest in the issue presented in this case, and their views can assist the Court in resolving that issue.

INTRODUCTION

Compelling reasons warrant granting certiorari. The petition presents an acknowledged conflict in the circuit courts of appeal. The conflict concerns an important and recurring issue – whether the preemption provision of SLUSA applies to securities fraud class actions on behalf of holders of securities that allege they refrained from selling securities in reliance on an alleged misrepresentation. This conflict threatens both the national uniformity that SLUSA and the PSLRA sought to create and the efficient functioning of the

securities markets. Only a decision by this Court will resolve this recurring and important issue.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN ACKNOWLEDGED CONFLICT THAT WILL NOT BE RESOLVED WITHOUT INTERVENTION BY THIS COURT.

15 U.S.C. § 78bb(f)(1) preempts any class action based upon state law concerning a material misrepresentation or omission "in connection with the purchase or sale of a covered security." As the Seventh Circuit has acknowledged, there is a plain and undeniable conflict among the circuits concerning whether this provision preempts a class action brought by persons who already held the affected security before the misrepresentation or omission was made. The Seventh Circuit has held that such "holder" class actions are preempted. *Kircher* v. *Putnam Funds Trust*, 403 F.3d 478, 483-84 (7th Cir. 2005), *rehearing denied* (May 2, 2005). This is also the official position of the SEC. Pet. App. 91a-94a. The Second Circuit (in the decision from which a writ of certiorari is sought), Eighth Circuit, and Eleventh Circuit have held that "holder" claims are not preempted. *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 43 (2d Cir. 2005); *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.2d 1334, 1342-43 (11th Cir. 2002); *Green* v. *Ameritrade, Inc.*, 279 F.3d 590, 596-99 (8th Cir. 2002).

An illustration will demonstrate the vastly different outcomes under the conflicting approaches. Suppose H buys stock at a price of $40 per share in defendant D *before* any alleged fraud. As time passes, the stock price climbs to $50. D allegedly suffers a business setback that it conceals for a period of time. *After* the alleged concealment begins, P purchases D's stock at $50 per share. Later, when the setback is subsequently disclosed, D's stock price drops to $30. H has remained a holder of D's stock throughout. H brings a class action based on state law alleging that the concealment

caused the holder class to refrain from selling at the $50 price.[2]

Separately, P brings a federal § 10(b) class action alleging that the concealment caused those who purchased after the concealment to suffer a loss from the post-purchase decline caused by the disclosure of the setbacks. In all federal circuits, the purchaser class action may proceed.

The circuit conflict concerns the holder class action. In the Seventh Circuit, the holder class action is preempted, and immediately dismissed. In contrast, in the Second, Eighth, and Eleventh Circuits, the holder case proceeds. Indeed, H's state law class action probably sues for both fraud and negligence, and for both compensatory and punitive damages, "in the hope that a local judge or jury may produce an idiosyncratic award." *Kircher*, 403 F.3d at 484.

It is important that this Court resolve the SLUSA preemption conflict now. In conjunction with the broad stock market declines between early 2000 and March 2003, there has been a proliferation of securities litigation. See, *e.g.*, Cornerstone Research, *Securities Class Action Case Filings – 2004: A Year in Review* 2, 16 (2005), *available at* http://securities.stanford.edu/clearinghouse_research/2004_YIR/2004010305.pdf. This includes numerous holder cases. See Pet. at 17 n.5 (collecting 24 reported federal decisions from 2000 to 2005 in holder cases). The Court should resolve this conflict now before additional judicial resources are wasted on this existing pipeline of preempted cases.

Most important, a prompt resolution from this Court is essential to meeting SLUSA's and the PSLRA's goals of national uniformity in securities litigation and an end to abusive securities cases. See Pet. at 3-4, 11, 16 (discussing

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[2] As we demonstrate *infra* at 10-11, the premise that a class of holders could have sold at the $50 price if the truth was disclosed earlier is economic nonsense.

legislative history). As this Court recognized in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), faced with potential securities class actions from all securities holders – not just purchasers and sellers – potential securities issuers and securities firms may conclude that "'[t]he hazards of a business conducted on these terms are [too] extreme.'" *Id.* at 748 (quoting *Ultramares Corp.* v. *Touche*, 174 N.E. 441, 444 (N.Y. 1931) (Cardozo, C.J.)). At a minimum, this Court has reaffirmed that it is bad policy to permit the "'*in terrorem*'" effect produced by meritless but large class actions that proceed past the pleading stages to discovery. *Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1634 (2005) (quoting *Blue Chip Stamps*, 421 U.S. at 741). The situation is particularly bad here. Many defendants face simultaneously a "holder" class action in state court and a "purchaser/seller" class action in federal court. This encourages not only a procedural morass of discovery conflicts and the like, but also inconsistent substantive rulings. This Court should put a stop to all of this now.

II. THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH THE LANGUAGE OF SLUSA AND THIS COURT'S PRIOR INTERPRETATION OF *BLUE CHIP STAMPS*.

SLUSA preemption does *not* require a misrepresentation "in connection with the purchase or sale [by the class members'] of covered securit[ies.]" Rather, SLUSA preemption requires only a misrepresentation "in connection with the purchase or sale of *a* covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added). Holder class actions rely in at least two ways on a misrepresentation "in connection with the purchase or sale of a covered security."

First, as this case illustrates, holder class actions necessarily allege a misrepresentation "in connection with the purchase or sale of a covered security" because they allege that a misrepresentation inflated the company's publicly-traded share price. See Pet. App. 6a (discussing respondents'

"allegations concerning Merrill Lynch's causing certain stocks to trade at 'artificially inflated' prices through the use of deceptive devices alleged to be the 'hallmarks of stock manipulation'"). Such alleged market price inflation requires that numerous purchases be made in reliance on the alleged material misrepresentation. Specifically, such alleged inflation occurs only when "the *market* price of shares *traded* on well-developed markets reflects all publicly available information and, hence, any material misrepresentations." *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 246 (1988) (emphases added).

Second, holder class actions necessarily allege an additional "connection" between the misrepresentation and "the purchase or sale of a covered security." Specifically, holder class actions allege that disclosure of the misrepresentation caused a decline in the company's stock price. Such an alleged decline exists only if a "lower price ... reflect[s]" that actual purchases and sales were made in reaction to the corrective disclosure of "the earlier misrepresentation." *Dura*, 125 S. Ct. at 1631-32.

The Second Circuit therefore properly did not say that the plain or literal language of SLUSA's preemption provision fell short of covering a holder class action. Rather, its decision rests entirely on the premise that when SLUSA was enacted in 1998, *Blue Chip Stamps* was the existing, authoritative interpretation of the exact same "language" appearing in § 10(b) of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j(b). Pet. App. 27a, 29a. But this premise is flawed. Indeed, this Court held in 1997, before SLUSA's enactment, that *Blue Chip Stamps* did not rest on interpreting the "in connection with" language of § 10(b).

Specifically, in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), the Court, quoting *Blue Chip Stamps*, 421 U.S. at 737, held: "We so confined the §10(b) private right of action because of 'policy considerations.'" 521 U.S. at 664. If Congress in 1998 was borrowing the existing judicial

interpretation of the "in connection with" language in § 10(b) when it enacted SLUSA, Congress surely would have been borrowing this Court's then-most recent decision, *O'Hagan*. See also *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 284 (1992) (O'Connor, J., joined by White and Stevens, JJ., concurring in part and concurring in the judgment) ("The purchaser/seller standing limitation in Rule 10b-5 damages actions thus does not stem from a construction of the phrase 'in connection with the purchase or sale of any security.'"); *Id.* at 289-90 (Scalia, J., concurring in the judgment) ("[T]he limitation we approved in *Blue Chip Stamps* was essentially a legislative judgment rather than an interpretive one."). *O'Hagan* authoritatively held that *Blue Chip Stamps* was *not* an interpretation of § 10(b)'s language. 521 U.S. at 664-65.

O'Hagan was right. The text of *Blue Chip Stamps* itself demonstrates that *Blue Chip Stamps* addressed not the interpretation of § 10(b)'s language, but rather the policy question of how to confine the judicially-created implied right of action for § 10(b) violations. The majority stated, "we would by no means be understood as suggesting that we are able to divine from the language of § 10(b) the express 'intent of Congress' as to the contours of a private cause of action under Rule 10b-5." 421 U.S. at 737. The Court concluded,

> we are not dealing here with any private right created by the express language of §10(b) or Rule 10b-5. *No language* in either of those provisions *speaks at all* to the contours of a private cause of action for their violation. . . . We are dealing with a private cause of action which has been judicially found to exist, and which will have to be *judicially delimited* one way or another unless and *until Congress addresses the question.*

Id. at 748-49 (emphases added).

Once it is recognized that *Blue Chip Stamps* is not based on the "in connection with" language, there is no basis on which

to constrict that language in SLUSA to less than its natural meaning.[3] Under that meaning, holder class actions that claim injury from the effects of a misrepresentation on a stock's market price, *supra*, at 5-6, are alleging a misrepresentation "in connection with the purchase or sale of *a* covered security." 15 U.S.C. § 78bb(f)(1) (emphasis added).

III. CONGRESS COULD NOT HAVE INTENDED THAT HOLDER CLASS ACTIONS WOULD HAVE MORE ROBUST REMEDIES THAN THOSE FOR PURCHASER AND SELLER CLASS ACTIONS.

Blue Chip Stamps plainly held that "holder" actions are abusive. As *Blue Chip Stamps* elucidated,

> a putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis.

421 U.S. at 734-35.

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[3] Nothing in SLUSA's legislative history refers to holder class actions. The Second Circuit relied upon floor comments of Senator Dodd that "[t]his legislation has been carefully crafted only to affect those types of class actions that are appropriately heard on the federal level." 143 Cong. Rec. 10475, 10477 (daily ed. Oct. 7, 1997), *available at* 1997 WL 614735. This sentence is merely a conclusion based on the prior sentence's statement that seven kinds of actions will remain "in State court." *Id.* Holder class actions were omitted from this list of preserved actions. The ambiguous comments of a single Senator provide no basis to constrict SLUSA's natural meaning. *See, e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-85 & n.2 (1992) (holding that "natural meaning" of preemption provision of "'any . . . regulation . . . relating to rates, routes, or services'" reached state regulation of advertising even though the "legislative history contains no statements specifically addressed to state regulation of advertising").

It is completely illogical to think that in SLUSA Congress intended holder class action plaintiffs to have more robust remedies and litigation tools than are available to class action plaintiffs who actually purchased or sold securities in reliance upon a misstatement or omission. SLUSA prevents purchasers and sellers of a security from bringing class action claims based on state law even if they are pendent to their federal claims. See 15 U.S.C. § 78bb(f)(1) (preempting state law class actions claims "in any State or Federal court"); *Rieger* v. *Drabinsky* (*In re Livent, Inc. Noteholders Secs. Litig.*), 151 F. Supp. 2d 371, 385, 442-43 (S.D.N.Y. 2001) (dismissing pendent state claims for common law fraud, negligence and negligent misrepresentation by purchasers). Purchasers and sellers bringing a § 10(b) class action must prove scienter and loss causation, satisfy heightened pleading standards, and comply with an initial stay of discovery, and (if they prevail) their remedies exclude punitive damages. See *Boguslavsky* v. *Kaplan*, 159 F.3d 715, 721 (2d Cir. 1998) ("punitive damages are unavailable"); *Cyrak* v. *Lemon*, 919 F.2d 320, 326 (5th Cir. 1990) ("Punitive damages are not recoverable in a 10b-5 action."); *Pelletier* v. *Stuart-James Co.*, 863 F.2d 1550, 1557 (11th Cir. 1989) ("'Actual damages' has been interpreted to mean some form of economic loss and does not include punitive damages.").

If holders are permitted to bring state law class actions, the arsenal at their disposal would often include punitive damages, the exaction of burdensome, costly discovery prior to the motion to dismiss stage, and relaxed pleading standards. Holder class plaintiffs often would have multiple state-law theories of recovery at their disposal including fraud, negligent misrepresentation, and statutory remedies such as unfair and deceptive trade practices (often with treble damages). Many such state causes of action are also accorded a lengthier statute of limitations period. It is incomprehensible that Congress (or anyone) would have created a system where class actions for securities holders have more

robust potential remedies and litigation tools than class actions for purchasers and sellers.

Such an incomprehensible disparity would be even more inexplicable because every federal court to examine a holder claim before SLUSA concluded that, as a class, holders cannot be injured.[4] This is best explained in *Crocker* v. *FDIC*, 826 F. 2d. 347, 351 (5th Cir. 1987) (footnote omitted):

> The flaw in the [holders'] argument is that it assumes a market for the stock existed at an artificially high price. This inflated price, and hence the particular market for the stock, was maintained only because of the wrongdoing of the [defendants], who concealed material financial information from the shareholders and the public that would have demonstrated the failing condition of the [company]. It follows that, had this information been released, the stock price would have immediately and precipitously fallen especially if, as is implicit in the [holders'] theory, an entire class of shareholders had simultaneously dumped their stock on the market. Thus, there would have been no market for the stock at the artificially high price. Without such a market, the [holders'] envisioned "profit opportunity" evaporates into hardly more than an illusion.

Applying *Crocker*'s analysis to our earlier illustration, *supra*, at 3-4, it is clear what would have happened to the holder class if there had been no post-purchase misrepresentation concerning the business setback. If the business setback had been promptly disclosed, D's stock price would have fallen from $50 to $30 *sooner*. The misrepresentation thus postponed the holders' recognition of a loss but it did not cause any loss. For the holder class, the business setback caused any loss. *Accord Kagan* v. *Edison Bros. Stores, Inc.*, 907 F.2d 690, 691-92 (7th Cir. 1990); *Arent* v. *Distribution*

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[4] Such "holder" claims were brought in either diversity or RICO cases.

Scis., Inc., 975 F.2d 1370, 1374 (8th Cir. 1992) ("[A]ny injury to plaintiffs was not caused by [defendant's] failure to disclose. Plaintiffs were not harmed because they were unable to realize the true value of their stock – they were harmed because the true value of their stock was zero."); *Chanoff* v. *United States Surgical Corp.*, 857 F. Supp. 1011, 1018 (D. Conn. 1994), *aff'd*, 31 F.3d 66 (2d Cir. 1994) (*per curiam*); see also *Levine* v. *Seilon, Inc.*, 439 F.2d 328, 329, 333-34 (2d Cir. 1971) (Friendly, J.) (holding that even if the purchaser-seller requirement was overruled, a holder could not prove injury, because "if the representation had not been made, the price of the stock would not have been inflated, and there would have been no gain to be realized by a sale"). It is simply senseless to read SLUSA's preemption provision as preserving more robust state law remedies for classes of uninjured securities holders than for classes of potentially injured securities purchasers and sellers.

IV. THIS COURT SHOULD GRANT CERTIORARI TO BLOCK THE SLIPPERY SLOPE INVITED BY THE SECOND CIRCUIT'S APPROACH.

As the SEC has noted, Pet. App. 96a & n.5, if failure to satisfy the purchaser/seller element for private § 10(b) actions may be used to defeat SLUSA preemption, plaintiffs will surely argue that so too does failure to satisfy 10(b)'s scienter requirement. See *Green* v. *Ameritrade, Inc.*, 120 F. Supp. 2d 795, 798-99 (D. Neb. 2000) (holding, in part, that a state law "claim [was] not preempted by SLUSA because no proof of scienter [was] required" by the state law claim), *aff'd on other grounds*, 279 F.3d 590 (8th Cir. 2002); *Burns* v. *Prudential Secs.*, 116 F. Supp. 2d 917, 924-26 (N.D. Ohio 2000) ("[P]laintiffs' allegations do not satisfy the scienter requirement for securities fraud under § 10(b) and Rule 10b-5. Because § 10(b) and Rule 10b-5 are nearly identical to the removal criteria set forth at § 78bb(f)(1) of SLUSA, it follows that removal is improper, and remand to state court is the appropriate course."). Thus, the Second Circuit's approach

invites a slippery slope where arguably, even purchaser/seller class actions could end up in state court as negligence class actions. That path is inconsistent with SLUSA's goals of national uniformity and ending vexatious securities lawsuits. Instead, this Court should grant certiorari and establish a nationwide rule that SLUSA's "preemptive effect is not confined to knocking out state-law claims by investors who have *winning* federal claims, as plaintiffs suppose. It covers both good and bad securities claims – *especially* bad ones." *Kircher*, 403 F.3d at 484.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

GEORGE R. KRAMER
SECURITIES INDUSTRY ASSOCIATION
1425 K Street, N.W.
Seventh Floor
Washington D.C. 20005
(202) 216-2000

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN*
APRIL E. FEARNLEY
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

MARJORIE E. GROSS
SARAH M. STARKWEATHER
THE BOND MARKET ASSOCIATION
360 Madison Avenue
New York, New York 10017
(646) 637-9200

Counsel for Amici Curiae

May 16, 2005

* Counsel of Record

(20)

No. 04-1371

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

SHADI DABIT, on behalf of himself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

WILLIAM B. FEDERMAN
Counsel of Record
STUART W. EMMONS
FEDERMAN & SHERWOOD
120 North Robinson Avenue
Suite 2720
Oklahoma City, OK 73102
(405) 235-1560

Counsel for Respondents

JAY B. KASNER
Counsel of Record
PREETA D. BANSAL
EDWARD J. YODOWITZ
SCOTT D. MUSOFF
JOANNE GABORIAULT
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Counsel for Petitioner

PETITION FOR CERTIORARI FILED APRIL 11, 2005
CERTIORARI GRANTED SEPTEMBER 27, 2005

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GENERAL DOCKET
US Court of Appeals for the Second Circuit

Court of Appeals Docket #:03-7499-cv

Nsuit: 3850 STATUTES-Secur Comm Exchange
Dabit v. Merrill Lynch Filed: 5/14/03

Appeal from: SDNY (NEW YORK CITY)

Case type information:
Civil
Private

None

Lower court information:
District: 02-cv-8472

Trial Judge Milton Pollack
MagJudge:
Date Filed: 10/23/02

Date order/judgement: 4/10/2003
Date NOA filed: 5/9/2003

Appendix A

Fee status:Paid
Panel Assignment:

Panel: JLO SS RCW 40 Foley Sq.
Date of decision 1/11/05

Prior cases: NONE

Current cases: NONE

Docket as of April 25, 2005 7:11 pm

Docket No. [s] : 03-7499-cv(L), 03-7458-cv(CON)

SHADI DABIT, on behalf of himself and all others similarly situated, IJG INVESTMENTS and IRLYS GUY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a corporation and MERRILL LYNCH & CO., INC.,

Defendants-Appellees.

Appendix A

Shadi Dabit Plaintiff-Appellant	Clell I. Cunningham Esq. [ret] Dunn Swan & Cunningham 210 Park Ave. Oklahoma City , OK , 73102 405-235-8318
SEC Amicus Curiae	Eric Summergrad Esq. [LD n] U.S. Securities & Exchange Commis 450 5th St., NW Principal Assista Washington , DC , 20549 202-942-0955
Merrill Lynch, Pier Defendant-Appellee	Jay B. Kasner Esq. [ret] Skadden Arps Slate Meagher & Flom 4 Times Square New York , NY , 10036 212-735-3000
Shadi Dabit Plaintiff-Appellant	William B. Federman Esq. [ret] Federman & Sherwood 120 N. Robinson Ave. Oklahoma City , OK , 73102 405-235-1560

* * *

Appendix A

6/11/03 Scheduling order #1 filed. Record on appeal due on 7/28/03. Appellant's brief and appendix due on 8/1/03. Appellee's brief due on 9/5/03. Argument as early as week of 10/20/03. It is recommended that this appeal be heard in tandem with 03-7458, IJG v. Merrill Lynch. (SB)

6/11/03 Ordered that the following appeals Docket Nos: 03-7458 are to be heard together. SEE SCHEDULING ORDER #1.

* * *

7/8/03 Letter dated 6/16/03 from William B. Federman notifying the Court that this appeal and appeals no. 03-7458 and 03-7999 are not similar and should not be consolidated received

* * *

8/1/03 Appellant Shadi Dabit brief FILED with proof of service.

8/1/03 Appellant Shadi Dabit joint appendix filed w/pfs. Number of volumes: 1.

* * *

9/5/03 Appellee Merrill Lynch, Pier brief filed with proof of service.

Appendix A

9/22/03 Appellant Shadi Dabit reply brief filed with proof of service.

* * *

12/15/03 Case heard before OAKES, SOTOMAYOR, WESLEY, C.JJ. . (TAPE: CD dated: December 15, 2003)

* * *

3/22/04 Letter sent to Allan Capute: requesting an amicus brief.

3/22/04 Notice to counsel in re: 3/22/04 letter sent requesting amicus brief.

Dear Mr. Capute:

The panel in the above-referenced appeals would like to invite the SEC to submit its views on these cases with regard to the questions listed below:

1. Whether the jurisprudence interpreting "in connection with" under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("§ 10(b)"), and Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), should be adopted for the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p and 78bb(f) ("SLUSA")?

2. Whether the purchaser-seller rule of standing or otherwise enunciated in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), should be adopted for SLUSA, so that an action will be preempted under SLUSA only if the action alleges that the plaintiff(s) actually purchased or sold a security as a result of the alleged misrepresentation or omission?

3. Whether SLUSA preempts actions that could not have been brought pursuant to § 10(b) and Rule 10b-5?

4. Where a brokerage allegedly issued intentionally false and biased research reports to garner investment banking business, whether the following state law claims arising from that activity meet SLUSA's "in connection with" requirement:

(a) claims brought by the brokerage's clients for annual flat fees paid to the brokerage for unbiased investment research, which fees are not triggered by any actual purchases or sales of securities;

(b) claims brought by the brokerage's clients for commissions fees paid to the brokerage for investing in securities recommended by the biased research;

(c) claims brought by the brokerage's broker-employees for investment losses suffered in retaining securities as a result of the brokerage's falsely touting the securities' values; and

(d) claims brought by the brokerage's broker-employees for the loss of future commissions to be paid by their clients who left the brokerage as a result of the biased research?

5. Whether the SEC takes a position on any other claims or arguments raised by the parties in these cases?

The Court hereby respectfully requests that the Securities and Exchange Commission submit its response addressing these questions, within forty-five (45) days after the date of this letter. Upon the request of the Commission, I will furnish the Commission with a copy of the briefs and the appendices on appeal in these cases.

The parties are allowed fifteen (15) days to respond to the SEC's submission. The parties response is limited to ten (10) typewritten, single-spaced pages.(RBM)

* * *

Appendix A

6/22/04 AMICUS CURIAE SEC, brief filed (as per the Court's 3/22/04 order) with proof of service.

* * *

1/11/05 Judgment of the district court is Affirmed in part and Vacated and Remanded in part by published signed opinion filed. (SS)

* * * *

APPENDIX B— RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:02-cv-08472-MP

Dabit v. Merrill Lynch	Date Filed: 10/23/2002
Assigned to: Judge Milton Pollack	Jury Demand: None
Demand: $0	Nature of Suit: 850 Securities/Commodities
	Jurisdiction: Federal Question

Case in other court: USDC-WDOK, 5:02-cv-564
MDL PANEL, MDL1484
Cause: 28:1331 Fed. Question: Other

No. 1:02-cv-08472-MP

SHADI DABIT,
on behalf of himself and all others similarly situated,

Plaintiff,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
a corporation,

Defendant.